

MILITARY VALUES IN LAW

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INTRODUCTION

One of the most celebrated leaders at the United States Military Academy at West Point in 2006 was a civilian—and a woman. West Point hired Maggie Dixon¹ as the head coach of Army's collegiate women's basketball team just eleven days before the practice season opened, following the unexpected resignation of her predecessor. As unusual as it was to choose someone from outside the program to take control of the team without much time to prepare, Dixon's hiring was notable for much more than its last-minute start. She was only twenty-seven years old, with no previous experience as a head basketball coach. Neither did she have any military experience. She would also become the only female head coach at West Point in any sport, male or female. Choosing Maggie Dixon was a tremendous leap of faith for Army basketball.

The basketball season from the fall of 2005 through the spring of 2006 became a "year of magical thinking"² for the Army Black Knights. After a slow start, Army reversed course and finished first in the regular-season Patriot League standings. It then won the post-season Patriot League tournament to earn its first bid to the "Big Dance," the National Collegiate Athletic Association's (NCAA) national championship tournament. At the end of the Patriot League tournament final against Holy Cross, hundreds of cadets rushed the court to celebrate Army's victory. The memorable scene of Dixon being paraded through the crowd on the shoulders of male West Pointers was featured prominently on television sports shows.³ The following day her appearance at West Point's mess hall was met with a standing ovation from the entire cadet brigade. Although Army lost its opening game in the NCAA tournament to national power Tennessee to close its season, Dixon had willed success from her future military officers far beyond what the Academy could possibly have foreseen. The rookie coach was named the Patriot League's Coach of the Year.

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1. For the events underlying the story of Maggie Dixon, see Ira Berkow, *West Point Is Standing at Attention for Army Women's Coach*, N.Y. TIMES, Mar. 15, 2006, at D5; Frank Litsky, *Maggie Dixon, 28, Who Led Army Women to Tournament*, N.Y. TIMES, Apr. 8, 2006, at C10; Selena Roberts, *Dixon's Civility Lightened Load at West Point*, N.Y. TIMES, Apr. 16, 2006, § 8, at 1.

2. Roberts, *supra* note 1, at 1.

3. Video of the last seconds of the Army-Holy Cross game and the post-game celebration on West Point's home court, Christl Arena, is available at <http://www.youtube.com/watch?v=WpfcCGLYevQ> (last visited Mar. 11, 2007).

Less than a month later, Maggie Dixon collapsed and died at the age of twenty-eight from an undiagnosed enlarged heart and malfunctioning mitral valve. She was buried at West Point Cemetery, an extraordinary honor awarded to a civilian who had never taken up arms herself and was not the wife or child of someone who had. What was also extraordinary was the way West Point officials talked about Maggie Dixon as a “leader” upon her death. Army officers do not lightly refer to people as “leaders.” Teaching leadership is the core mission of the Academy, and there is no higher compliment than to be remembered as a leader within an institution of leaders. At West Point, however, the name “Maggie Dixon” became synonymous with leadership.

In an official Army press release crafted in the stilted “Army-ese” that characterizes military awards and decorations, Lieutenant General William J. Lennox, Jr., the Superintendent of West Point, said the following about Dixon’s contribution to West Point: “She consistently displayed great leadership and served as an outstanding role model for those both on and off her team. She was a leader of character with a commitment to excellence who set the example in all she did.”⁴ When Lennox later spoke extemporaneously, however, the three-star general’s admiration for Dixon’s performance as an Army leader came through much more strongly:

Her presence was what really struck us. That’s the impact a leader can have and, in a house of leaders, she stood out. She exuberated courage, strength, caring; she just embodied everything that we learn here at West Point. Her energy just kind of seeped into everyone else and she just—she’s everything that we talk about here being a leader. She was everything and more.⁵

At Dixon’s memorial service, Lennox offered West Point’s ultimate praise when he said, “Here, where we develop leaders of character, Maggie was the consummate leader.”⁶

The reason Maggie Dixon’s legacy is relevant to this Article and to this Symposium issue is because the military almost never speaks of women as leaders in the way West Point spoke of its civilian basketball coach and the influence she had in her six short months with Army cadets. The Army seemed truly stunned to find in its midst a woman who exercised leadership as effortlessly and effectively as did Maggie Dixon. What added to the surprise, I’m sure, was finding such a talent for leadership in a young civilian who had

4. Press Release, U.S. Army, Army Women’s Basketball Coach Dies Suddenly, No. 09-06 (Apr. 7, 2006), available at 2006 WLNR 5920372.

5. *SportsCenter* (ESPN television broadcast on Apr. 10, 2006) (transcript available at 2006 WLNR 6074058).

6. Kevin Kernan, *She Will Carry On: Dixon Leaves Legacy of Honor, Leadership at Army*, N.Y. POST, Apr. 9, 2006, at 80. Interviewed at the opening of the next basketball season, one of Dixon’s returning players, Cadet Margaree King, concurred:

“She embodies what West Point teaches us as leaders,” King says. “She was positive; she led by example. She was honest, straight up with you at all times. One thing we learn here is you’re supposed to care about the people you’re leading, and she did. She made everyone on this team feel special, that they had something to offer. If I can be like her just a little bit, and bless the world just a little bit like she did, I will have done a great thing.”

Kelly Whiteside, *They’re Playing for Maggie: Dixon’s Presence Hovers Over Army Women*, USA TODAY, Oct. 4, 2006, at 3C.

never before been exposed to the military. Dixon personified martial values of leadership that the military so often struggles—and so often fails—to foster in women. West Point’s deep veneration of Dixon also unintentionally revealed how far the military must be falling short in teaching men to appreciate the display of military values in women. It was plain to me that Maggie Dixon led West Point to think of women and leaders in ways that were a bit less mutually exclusive than they were before she arrived, but her strength in leadership shouldn’t have been that novel in an institution that prides itself as a house of leaders.

As a society, both civilian and military, we remain uncomfortable with the application of professional military values and judgment to the women who serve in the military profession. Surprisingly, most participants in “women in the military” debates, regardless of whether they support an enhanced or a diminished role for women in military service, are complicit in distancing military women from the military values and judgment that all members of the military should internalize and rely on for their mutual well-being.

Congress, for example, takes inappropriate advantage of the tremendous deference given by courts to its constitutional powers to “raise and support Armies,” to “provide and maintain a Navy,” and to “make Rules for the Government and Regulation of the land and naval Forces.”⁷ Well aware that courts are reluctant to question legislation that even purports to rely on military judgment, Congress has often disregarded the actual values and traditions of the military profession and substituted its own distinctly non-military, majoritarian notions concerning the appropriate role of women in military service. On the other hand, those who oppose limitations on women in military service, or who seek policy changes designed to prevent the maltreatment of military women, often reflexively recoil from any mention of military values, assuming that all martial traditions are inherently unfriendly to women.

The military itself occupies an uneasy place in the middle. It sometimes realizes that enforcement of traditional military values and reliance on professional military judgment are the best means of maximizing both the service of women and mission readiness, but it sometimes succumbs to the inevitable temptation offered by legal doctrine that can excuse the military from having to explain or justify its decisions. The military may also bend to pressure from a Congress seeking convenient military cover for a controversial legislative policy choice. The only common ground that ever joins all three groups—Congress, the military, and the military’s critics—is the desire to avoid the teaching and influence of actual military values in situations in which military judgment, properly and professionally applied, would lead to inconvenient, difficult, or uncomfortable conclusions.

The central thesis of this Article is that avoidance of professional military values consistently tends to disadvantage military women, and that greater adherence to military values would lead to increased respect for military women and would also enhance military effectiveness. Two of the most important contemporary issues concerning women in military service are the assignment of women to combat duty and the control of sexual assault in a military

7. See U.S. CONST. art. I, § 8, cls. 12–14.

environment. In both instances, an imperfect process of identifying and applying military values has distorted federal law and defense policy, imposing unnecessary burdens on women and unnecessary detriment to military readiness. In some cases the damage is of constitutional dimension; in others, the result is just painfully bad and counter-productive policy. It is important to note, however, that movement toward greater reliance on professional military values in law and policy favors no single political interest uniformly. Among Congress, the military, and the military's critics, all would need to amend the positions they have taken on some strongly contested issues. The unifying principle for military law and policy would no longer be liberal versus conservative, or military versus civilian, or male versus female. Instead, decisions would be guided much more closely by reliance on traditional professional values of military leadership and discipline.

Part I of this Article examines the legal context of assignment of women to military duty in combat. It begins with analysis of a 1981 decision of the United States Supreme Court that framed military service by women in a way from which they have yet to recover. *Rostker v. Goldberg*⁸ upheld the exclusion of women from universal military draft registration. More broadly, *Rostker* firmly established the Court's doctrine of judicial deference on military issues—even under circumstances in which the military disagreed with Congress's use of military personnel policy to affirm traditional notions of gender roles. The decision also gave Congress the discretion to disregard constitutional principles of equal protection on the basis of sex,⁹ provided the classification was based on an understanding of military combat that by definition excluded women. Twenty-five years later, the military reality is that women serve in both *de jure* and *de facto* combat roles overseas, and yet Congress—and occasionally the military—continue to cling to the reasoning of *Rostker* as a justification for denying women the appropriate recognition and responsibility for the military duties they perform.

Part II examines recent developments and proposals related to the control of sexual misconduct against military women. The last fifteen years have been a never-ending Groundhog Day of repeated studies, repeated proposals, and repeated promises about the prevention of sexual misconduct that have led to very little practical improvement. The principal reason for lack of progress is that both the military and its critics have often doggedly insisted on solving the problem without reference to professional military values—and at times in ways that directly undermine those values. A generation of service members has been taught the counter-productive lesson that military leadership involves two completely separate and unrelated tasks: first, the maintenance of military discipline within core military functions; and second, the maintenance of military discipline related to women. The conventional wisdom (or, more accurately, lack thereof) within the military is that traditional values of military

8. 453 U.S. 57 (1981).

9. "Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

MILITARY VALUES IN LAW 981

discipline and leadership offer relatively little in solving the tenacious, yet still fairly pedestrian, problem of training service members to simply respect and protect one another.

I. ASSIGNMENT OF WOMEN TO COMBAT DUTY

The Supreme Court decision that looms over all questions related to military service by women is *Rostker v. Goldberg*,¹⁰ which upheld the Military Selective Service Act's requirement that men, but not women, register for a potential military draft. *Rostker* occupies the legal field of women in military service for two reasons: (1) it allowed congressional definitions of combat duty, and congressional limits on who could be assigned to perform it, to stand as *per se* exceptions to the demands of equal protection in a military context; and (2) it established a newly deferential standard of review in constitutional claims involving the military that, in practice, removes professional military judgment from the equal protection equation, even though military judgment was nominally the reason for deference. These two fundamental aspects of the opinion worked together in a powerfully synergistic way. If principles of equal protection do not apply in the context of combat duty, and if Congress has the latitude to both define and assign the functions that qualify as combat duty without having any corresponding constitutional obligation to explain or justify its decisions, then by definition Congress has the unreviewable power to control when, and to what degree, principles of equal protection apply to women in a military context.

A. Judicial Deference to Military Judgment, Without the Judgment

Rostker is best known for its creation of a broad doctrine of judicial deference to congressional judgment in matters involving the military: "[J]udicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."¹¹ Less well-known is how much the Court's precedent had to be expanded and distorted to achieve it. Prior cases that granted a benefit of the doubt to decisions involving military matters tended to rely on the military's application of its own professional judgment to specific facts in specific cases. In *Orloff v. Willoughby*,¹² for example, the Court deferred to an individualized judgment concerning the assignment or behavior of a particular service member. The Court was not interested in "running the Army"¹³ by deciding whether one particular

10. 453 U.S. 57 (1981). For contemporaneous analyses of the case, see *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 161-71 (1981); Note, *Women and the Draft: The Constitutionality of All-Male Registration*, 94 HARV. L. REV. 406 (1980).

11. *Rostker*, 453 U.S. at 70.

12. 345 U.S. 83 (1953).

13. *Id.* at 93. "Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots. Courts are presumably under as great a duty to entertain the complaints of any of the thousands of soldiers as we are to entertain those of Orloff." *Id.* at 94. Orloff had fallen into disfavor with the Army because he refused to fill out a loyalty certificate that required disclosure of any association with subversive organizations. See *id.* at 89.

conscripted doctor should have been assigned work as a physician rather than as a medical laboratory technician. Neither was the Court inclined to involve itself when college students asked the judiciary, in *Gilligan v. Morgan*,¹⁴ to take on a continuing supervisory role over the activities of the Ohio National Guard following the Kent State shootings in 1970. The Court sensibly concluded that courts were completely unqualified to evaluate the Guard's "training, weaponry, and orders," to establish new standards for its military operations, or to exercise continuing surveillance of its performance under those standards:

Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed requisite technical competence to do so.

. . . .

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.¹⁵

The Court similarly deferred to the Army's court-martial determination in *Parker v. Levy*¹⁶ that a Vietnam-era dermatologist had engaged in conduct "unbecoming an officer and a gentleman" and conduct "to the prejudice of good order and discipline" when he refused to conduct training for medics and urged lower-ranking soldiers to refuse to fight in Vietnam.¹⁷

Orloff v. Willoughby, *Gilligan v. Morgan*, and *Parker v. Levy* all served as testaments to the value of professional military judgment and expertise, when applied within the appropriate sphere. In *Rostker v. Goldberg*, however, the reach of judicial deference expanded exponentially. The Court adopted an abjectly deferential stance with respect to a law of general applicability drawn upon one of the broadest and least factually specific classifications possible—on the basis of sex—without any serious scrutiny of the reasons offered for that classification. It deferred even though Congress's decision to exclude women from draft registration ran counter to professional military advice—all branches of the military *wanted* to register women—and even though the Court's principal

14. 413 U.S. 1 (1973).

15. *Id.* at 8–10. The Court noted, however, "it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief." *Id.* at 11–12 (footnote omitted).

16. 417 U.S. 733 (1974).

17. *Id.* at 736–38.

MILITARY VALUES IN LAW 983

justification for deference, oddly, was its professed respect for the kind of “professional military judgments” made in *Orloff, Morgan, and Levy*.¹⁸

Judicial deference also obscured the Court’s departure from what should have been an intermediate standard of review when evaluating facial classifications on the basis of sex under *Craig v. Boren*.¹⁹ The government should have had the burden of demonstrating that a legal distinction between men and women served important governmental objectives and was substantially related to the achievement of those objectives.²⁰ In the specific context of registration for a military draft, intermediate scrutiny should have required a showing that registration of women would substantially interfere with the building of an effective fighting force. Instead, *Rostker* turned the tables and asked only if it was possible to build an effective military force without registering women.²¹ The Court applied principles of equal protection in precisely backward fashion. Normally government must explain why it is important to exclude men or women; men or women don’t need to explain why it is important to include them.²² From the military’s point of view, the most productive course would have been to register the maximum number of potentially qualified persons in the event volunteers were insufficient.

B. Definitions of Combat Duty as a Limiting Principle for Equal Protection

The second important aspect of *Rostker* was its use of combat duty as a conceptual device for managing the place of women in military service. The Court assumed for purposes of its decision that the exclusion of women from combat duty, as it was broadly defined at the time, was constitutional,²³ and it

18. See *Rostker*, 453 U.S. at 65–66.

19. 429 U.S. 190 (1976).

20. See *id.* at 197.

21. See *Rostker*, 453 U.S. at 80 (relying on Senator Sam Nunn’s statement that “there was no military necessity cited by any witnesses for the registration of females”).

22. Justice Marshall’s dissent stated the standard for intermediate scrutiny correctly:

Thus, the Government’s task in this case is to demonstrate that excluding women from registration substantially furthers the goal of preparing for a draft of combat troops. Or to put it another way, the Government must show that registering women would substantially impede its efforts to prepare for such a draft.

Id. at 94 (Marshall, J., dissenting). In applying this standard, Marshall believed that the burden of justifying the classification lay squarely with the government.

[I]t is not appellees’ burden to prove that registration of women substantially furthers the objectives of the MSSA. Rather, because eligibility for combat is not a requirement for some of the positions to be filled in the event of a draft, it is incumbent on the Government to show that excluding women from a draft to fill these positions substantially furthers an important government interest.

Id. at 104–05 (footnote omitted; alteration added).

23. See *id.* at 87 (“[T]his case does not involve a challenge to the statutes or policies that prohibit female members of the Armed Forces from serving in combat.” (alteration added)). Similarly, *Schlesinger v. Ballard*, 419 U.S. 498 (1975), relied on the statutory prohibition against women serving on Navy ships in validating a promotion system that gave women a longer period of time in service before failure of promotion required discharge. “Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants.” *Id.* at 508. In both *Rostker* and *Schlesinger*, therefore, the Court justified the sex-based classification at issue on the basis that another sex-based classification left men and women no

then accepted without scrutiny Congress's assertion that a draft would be used only to add service members eligible to perform combat duty.²⁴ Given these artificial parameters, the Court's decision made a certain amount of sense, but it disregarded the reality—evidenced by the military's stated desire to use female non-volunteers (80,000 of them in the first six months of a draft)—that many draftees would serve in positions that did not involve combat duty.²⁵ At the time of *Rostker*, furthermore, it had been less than a decade since the military began assigning women in substantial numbers to jobs outside traditional medical and administrative fields.²⁶ Even so, the need for female non-volunteers was significant.

Rostker rested on a false factual underpinning at the time it was decided. The only thing that enabled the Court to hold up this house of cards was its refusal to scrutinize congressional justifications in the same way it would have had the military not been at issue. Given a civilian context, it wouldn't have taken a lot of scrutiny to find the classification constitutionally impermissible. The government did not attempt to hide the fact that its policy choice was motivated by a desire to maintain traditional notions of proper roles for women, and not by a desire to ensure an adequate pool of qualified candidates for military service:

[W]e start with the proposition that American society today will not consider drafting women for combat service. Whether this conviction is a moral judgment or a prejudice, a "felt necessity" or an echo of earlier, chivalric beliefs about the proper role of women in life, the existence of the belief is a fact reflected in statutes no group in Congress would now change, and no court would declare unconstitutional.²⁷

Citing the Senate's finding that "[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people,"²⁸ the Court concluded that Congress "was fully aware . . . of the current thinking as to the place of women in the Armed Services."²⁹ If not for the creation of a military safe harbor to the usual standards

longer similarly situated to one another, ironically relieving the government of the obligation to treat them equally under law. The only decision of the Supreme Court finding military men and women similarly situated for purposes of equal protection was *Frontiero v. Richardson*, 411 U.S. 677 (1973), which struck down a rule granting health and housing benefits to all wives of male service members, but to husbands of female service members only if they could demonstrate actual financial dependency.

24. "Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops. . . . The purpose of registration, therefore, was to prepare for a draft of combat troops." *Rostker*, 453 U.S. at 76.

25. See *id.* at 81; *id.* at 84 (White, J., dissenting).

26. See JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 274 (rev. ed. 1992) (describing military women's "metamorphosis from 'typewriter soldiers' to mainstream military personnel" in the 1970s).

27. 126 CONG. REC. 13,882 (1980) (quoting a letter written to Senator Sam Nunn by Joseph W. Bishop, Robert H. Bork, and Eugene V. Rostow, then Professors of Law at Yale Law School).

28. *Rostker*, 453 U.S. at 77 (citing S. REP. NO. 96-826, at 157 (1980)).

29. *Id.* at 71. Another interesting aspect of *Rostker* is the remarkable spin it placed on precedent invalidating legal distinctions on the basis of sex if they were the "accidental by-product of a traditional way of thinking about females." See *id.* at 74 (quoting *Califano v. Webster*, 430 U.S. 313,

MILITARY VALUES IN LAW 985

of equal protection, however, this argument would have left the Court no choice but to strike down the law as unconstitutional. It is simply not a legitimate function of government to police traditional gender roles.³⁰

In the twenty-five years since *Rostker*, the trend within the all-volunteer force has been to consistently narrow the definition of duties considered too combat-identified for women to perform.³¹ The most significant expansion of military duties for women took place following the first Gulf War, when it became impossible to ignore the military's reliance on women's service. Federal laws that specifically prohibited assignment of women to combat ships or aircraft in the Navy and Air Force were repealed.³² The focus of combat exclusion shifted to the land-based services, but even there the Department of Defense opened assignments for women that involved combat risks of hostile fire or capture provided their primary duties did not require engagement in "direct" forms of combat. In January 1994, Secretary of Defense Les Aspin issued the *Direct Ground Combat Definition and Assignment Rule*:

A. Rule. Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground, as defined below:

B. Definition. Direct ground combat is engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.³³

320 (1977)). The exclusion of women from draft registration did not violate equal protection principles, according to the Court, because Congress acted *knowingly and deliberately* when it codified traditional ways of thinking about females. "The issue was considered at great length, and Congress clearly expressed its purpose and intent." *Rostker*, 453 U.S. at 74.

30. See *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (dismissing "archaic and overbroad generalizations" about the roles of women as illegitimate justifications for classifications drawn on the basis of sex).

31. See generally Captain Alice W.W. Parham, *The Quiet Revolution: Repeal of the Exclusionary Statutes in Combat Aviation—What We Have Learned From a Decade of Integration*, 12 WM. & MARY J. WOMEN & L. 377 (2006). Captain Parham is a lawyer and an F-16 fighter pilot with the South Carolina Air National Guard who has served three combat tours in Iraq.

32. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102–190, § 531, 105 Stat. 1290, 1365 (1991) (opening naval aviation to women and repealing 10 U.S.C. § 8549, which barred Air Force women from assignment to "duty in aircraft engaged in combat missions"); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103–160, § 541, 107 Stat. 1547, 1659 (1993) (repealing 10 U.S.C. § 6015, which barred women from assignment to "duty on vessels that are engaged in combat missions (other than as aviation officers as part of an air wing or other air element assigned to such a vessel)" and from assignment to "other than temporary duty on other vessels of the Navy except hospital ships, transports, and vessels of a similar classification not expected to be assigned combat missions").

33. Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force et al., *Direct Ground Combat Definition and Assignment Rule* (Jan. 13, 1994) [hereinafter *Direct Ground Combat Definition and Assignment Rule*]; see also GEN. ACCOUNTING OFFICE, *GENDER ISSUES: INFORMATION TO ASSESS SERVICEMEMBERS' PERCEPTIONS OF GENDER INEQUITIES IS INCOMPLETE* 18–19 (1998) (summarizing DOD and individual service assignment policies and practices), available at <http://www.gao.gov/archive/1999/ns99027.pdf>; GEN.

The new defense policy also permitted, but did not require, the exclusion of women from additional assignments not covered by the rule under the following circumstances:

- Where the Service Secretary attests that the costs of appropriate berthing and privacy arrangements are prohibitive;
- Where units and positions are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women;
- Where units are engaged in long range reconnaissance operations and Special Operations Forces missions; and
- Where job related physical requirements would necessarily exclude the vast majority of women service members.³⁴

Under the new policy, the military's conception of combat duty for purposes of the assignment of women was no longer directly connected to the physical risk of combat. Women would perform duties that might require them to "engag[e] the enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel"³⁵—the core activity of direct ground combat—provided they were not assigned to smaller units whose primary mission was to do so.

The new ground-combat definition seemed to mark the final erosion of *Rostker's* factual foundation. In exempting women from the obligation to register for a potential military draft, the Court had relied heavily on the statutory prohibition against women's service aboard combat aircraft and combat ships and on the defense policy that barred women from combat support functions on the ground involving risk of exposure to combat danger.³⁶ By 1994, however, every significant limitation on the service of women had either been repealed or significantly narrowed. It was therefore difficult to contend that women and men were not similarly situated with respect to military service when the remaining core of combat duties closed to women constituted only a small minority of the military's forces overall.³⁷ Congress, however, was not deterred. In response to the forthcoming *Direct Ground Combat Definition and Assignment Rule*, Congress enacted a requirement, as part of the National Defense Authorization Act for Fiscal Year 1994, that the military must report to Congress ninety days in advance of implementing any proposal to further amend the ground-combat exclusion policy. The military was required to provide "a

ACCOUNTING OFFICE, GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION (1998), available at <http://www.gao.gov/archive/1999/ns99007.pdf>.

34. Direct Ground Combat Definition and Assignment Rule, *supra* note 33.

35. *Id.*

36. See *Rostker v. Goldberg*, 453 U.S. 57, 76 (1981).

37. See WOMEN'S RESEARCH & EDUC. INST., WOMEN IN THE MILITARY 13 fig.2 (5th ed. 2005) (indicating that as of 1994, 62% of Marine Corps positions, 70% of Army positions, 91% of Navy positions, and 99% of Air Force positions were open to women); MARGARET C. HARRELL ET AL., RAND CORP., THE STATUS OF GENDER INTEGRATION IN THE MILITARY: ANALYSIS OF SELECTED OCCUPATIONS 5 (2002) (presenting similar data).

MILITARY VALUES IN LAW 987

detailed description of, and justification for, the proposed change to the ground combat exclusion policy.”³⁸

There is nothing inappropriate, as a general matter, with a congressional directive that requires the military to report on its activities. Congress, after all, is charged with a constitutional responsibility to govern and regulate the military, and the military operates under a professional ethic of subordination to civilian control. However, an issue of equal protection emerges when Congress permits the military to assign its personnel without reporting to Congress in advance, except when they are female. And this requirement was not even the most constitutionally suspect of the legislation. In addition to a detailed description of, and justification for, the proposed change, the law required the military to affirm, in effect, that any change in policy would leave the constitutional immunity awarded by *Rostker* undisturbed: “The Secretary [of Defense] shall include . . . a detailed analysis of legal implication of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act to males only.”³⁹ It is unclear why Congress believed it was useful or appropriate to ask the military to comment on whether it thought *Rostker* was still good law, but it seems likely the requirement was intended to send a message of congressional determination to preserve traditional gender roles in the context of military service, notwithstanding intervening changes in the reality of women’s service.⁴⁰

C. Conflicts Between Legal Pretense and Military Reality

The 1994 *Direct Ground Combat Definition and Assignment Rule* set in motion an evolution of increasing assignments of women to combat and combat-support functions throughout the military services. After September 11, 2001, military experts predicted that men and women would fight the next war in seamlessly-integrated ground units in combat-support functions such as military police, intelligence, chemical warfare, and engineering.⁴¹ It would take another war, however, before the reality of women in combat roles resurrected the usual dissonance concerning the place of women in military service. In the second Iraq War, it became evident that the assumptions underlying rules for assigning women to combat duties were no longer accurate and that women

38. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 542(b)(3)(A), 107 Stat. 1547, 1659-60 (1993) (repealed and replaced by a similar provision in the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541, 119 Stat. 3136 (2006)) (codified at 10 U.S.C. § 652 (West Supp. 2006)).

39. Pub. L. No. 103-160, § 542(b)(3)(B) (alteration added).

40. A report by the House Committee on Armed Services explained that

the committee does not intend that these affirmative legislative actions on the assignment of women to combat positions be construed as tacit committee concurrence in an expansion of the assignment of women to units or positions whose mission requires routine engagement in direct combat on the ground, or be seen as a suggestion that selective service registration or conscription include women.

H.R. REP. NO. 103-200, at 283 (1993).

41. See Phillip Carter, *War Dames*, WASH. MONTHLY, Dec. 2002, at 32.

were in fact serving in combat roles,⁴² regardless of the government's insistence that they were not. The core definition of direct ground combat was itself in question because the battlefield had ceased to be linear.⁴³ There was no longer a place that was predictably "well forward on the battlefield," a central component of the *Direct Ground Combat Definition and Assignment Rule*.⁴⁴ Furthermore, combat duty was no longer reserved for the traditional combat arms; in Iraq, for example, military police units (assignments open to women) were used interchangeably with infantry units (assignments closed to women). The Army relied on smaller, more mobile organizational units, a trend that played havoc with the rule prohibiting the assignment of women to combat support and combat service support units that co-locate with combat units.⁴⁵

The military tended to veer back and forth, sometimes acknowledging the reality that women served in combat roles and sometimes denying, stubbornly and clumsily, that they did. In February 2005, the Army announced a new combat honor, the Close Combat Badge (CCB), which was designed to recognize valor on a new battlefield that respected neither identifiable front lines nor zones of the safety in the rear. The original guidelines for award of the badge stated: "The CCB will be presented only to eligible Soldiers who are personally present and under fire while engaged in active ground combat, to close with and

42. See Lizette Alvarez, *Jane, We Hardly Knew Ye Died*, N.Y. TIMES, Sept. 24, 2006, § 4, at 1 (noting the wide integration of women in combat tasks and characterizing the Direct Ground Combat Definition and Assignment Rule's recommendation against co-location of female soldiers with small combat units as "fuzzy" in application); Maura J. Casey, *Then and Now, Female Soldiers Just Do Their Jobs*, N.Y. TIMES, Nov. 11, 2006, at A14 (noting that 68 women had been killed in action and 436 wounded in Iraq and Afghanistan; "reality has overrun critics' arguments"); Romesh Ratnesar & Michael Weisskopf, *Person of the Year; Portrait of a Platoon: How a Dozen Soldiers—Overworked, Under Fire, Nervous, Proud—Chase Insurgents and Try to Stay Alive in One of Baghdad's Nastiest Districts*, TIME, Dec. 29, 2003, at 58 (reporting on a field artillery survey platoon assigned to infantry duties; a woman, Specialist Billie Grimes, served as its combat medic); Eric Schmitt, *Female M.P. Wins Silver Star for Bravery in Iraq Firefight*, N.Y. TIMES, June 17, 2005, at A16 (describing military police Sergeant Leigh Ann Hester's bravery under fire that repelled an insurgent ambush; Hester received a Silver Star, the Army's third-highest award for bravery); Kirk Semple, *A Captain's Journey From Hope to Just Getting Her Unit Home*, N.Y. TIMES, Nov. 19, 2006, § 1, at 1 (chronicling the experiences of Captain Stephanie A. Bagley, West Point graduate and company commander of a military police unit conducting foot patrols in Baghdad and training Iraqi police forces); Ann Scott Tyson, *Female Pilots Get Their Shot in the Iraqi Skies*, WASH. POST, Feb. 27, 2006, at A1 (discussing female aviators serving in direct combat roles) [hereinafter Tyson, *Female Pilots*]; Ann Scott Tyson, *For Female GIs, Combat Is a Fact*, WASH. POST, May 13, 2005, at A1 (reporting male and female soldiers' "frustration over restrictions on women mandated in Washington that they said make no sense in the war they are fighting"); Josh White, *Military Honors for a Changing Front*, WASH. POST, Oct. 18, 2006, at A19 (discussing the Marine Corps' Combat Action Ribbon and the Army's Combat Action Badge, combat honors awarded to both men and women "who are exposed to enemy action but are not officially in combat roles"). The most comprehensive and up-to-date account of women's combat service in Iraq can be found in ERIN SOLARO, *WOMEN IN THE LINE OF FIRE: WHAT YOU SHOULD KNOW ABOUT WOMEN IN THE MILITARY* (2006).

43. See Phillip Carter, *How the Front Lines Came to the Rear*, N.Y. TIMES, Dec. 12, 2004, § 4, at 13.

44. See Direct Ground Combat Definition and Assignment Rule, *supra* note 33.

45. A report by the House Committee on Armed Services noted that "[t]he committee recently began to examine how the Army was applying this so-called collocation policy with units deployed in Iraq and Afghanistan and with units being reorganized as a result of modularization." H.R. REP. NO. 109-89, at 321 (2005).

MILITARY VALUES IN LAW 989

destroy the enemy with direct fires.”⁴⁶ Nothing about the guidelines suggested any intent to make distinctions on the basis of sex, except for the definition of an “eligible Soldier,” which was designed to track the Department of Defense’s definition of assignments from which women must be barred:

The Army will award the CCB to Armor, Cavalry, Combat Engineer, and Field Artillery Soldiers in Military Occupational Specialties or corresponding officer branch/specialties recognized as having a high probability to routinely engage in direct combat, and they must be assigned or attached to an Army unit of brigade or below that is purposefully organized to routinely conduct close combat operations and engage in direct combat in accordance with existing rules and policy.⁴⁷

In short, no women were allowed to receive the honor, regardless of the degree to which they were “personally present and under fire while engaged in active ground combat.” Interestingly, the definition also rendered *men* automatically ineligible if they served under fire while assigned to units open to women. It was apparently so important to deny the honor to any woman that it was worth denying it to a much larger number of men as well.

At a military town hall meeting in Afghanistan, a female enlisted soldier asked Secretary of Defense Donald Rumsfeld why the qualifications for the CCB excluded soldiers on the basis of their occupational specialty alone, and not on the basis of their individual combat performance. She asked, “I’m wondering why our MPs [military police] aren’t considered for the close-combat patch [badge]?”⁴⁸ For her efforts to speak up under what must have been intimidating circumstances, the soldier earned little more than laughter. Secretary Rumsfeld first passed the question to the three-star general in attendance who, when pressed to explain the reasoning behind the eligibility standard, said, “You guys have got to realize that I get to do this with the Secretary every two weeks and we get lots of tough questions like that.” The transcript recorded laughter in response to the general’s evasive answer. Rumsfeld took advantage of the diversion and asked for a new question from someone else: “Last question. Make it an easy one. I’ve had a long day.”⁴⁹ The soldier never did receive an answer from either the general or the Secretary, and the transcript exuded smugness and arrogance in response to her reasonable question. Apparently, however, the subsequent publicity arising from her question eventually had an effect. The Army withdrew the CCB proposal and created the similarly named CAB (the Combat Action Badge), which would be awarded without regard to occupational specialty—and without regard to sex—to soldiers who were “personally present and actively engaging or being engaged by the enemy.”⁵⁰

46. News Release, U.S. Army Public Affairs, Army Announces Close Combat Badge (Feb. 11, 2005), available at http://www4.army.mil/ocpa/read.php?story_id_key=6853.

47. *Id.*

48. News Transcript, U.S. Department of Defense, Secretary Rumsfeld Townhall Meeting in Kandahar, Afghanistan (Apr. 13, 2005) (alterations added), available at <http://www.defenselink.mil/transcripts/2005/tr20050413-secdef2502.html>.

49. *Id.*

50. See U.S. Army Combat Badges, <http://www.army.mil/symbols/combatbadges> (last visited Mar. 6, 2007).

There was no reason this had to be so difficult, unless the Department of Defense's motivation was to avoid acknowledging that women serve in combat. Later in the spring of 2005, a military personnel sub-committee of the House Armed Services Committee approved an amendment that would have immediately barred women from thousands of positions in Iraq and Afghanistan in which they already served.⁵¹ The amendment would have codified a broader definition of combat duties to which women could not be assigned, despite the military's objection that combat support and combat service support units already employed both men and women routinely:

Prohibition. Female members of the Army may not be assigned to duty in positions in forward support companies.

Forward Support Companies. In this section, the term 'forward support company' includes any unit of the Army of company size (regardless of name) that:

- (1) provides combat support or combat service support to a direct ground combat battalion; and
- (2) in providing such support . . .
 - (A) maneuvers with, is attached to, or has a support mission to one or more direct ground combat companies of such direct ground combat battalion; or
 - (B) performs any combat support or service support function or mission within the operational area of such direct ground combat battalion.⁵²

The amendment was eventually withdrawn,⁵³ but Congress enacted in its place another plea to preserve the legal immunity provided by *Rostker*, a military mission that never seems to end. Congress again directed the military, just as it had twelve years earlier, to give notice in advance of any proposal to amend the combat exclusion policy. Once again, Congress also directed the military to provide "a detailed analysis of legal implication of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act to males only."⁵⁴ It seems very unlikely that Congress was asking for the military's helpful warning in order to avoid an unintentional violation of equal protection principles—a "heads up," so to speak—in the event widespread utilization of women in military service had created a constitutional

51. See Ann Scott Tyson, *Panel Votes to Ban Women From Combat*, WASH. POST, May 12, 2005, at A8.

52. Amendment to H.R. 1815, National Defense Authorization Act for Fiscal Year 2006, 109th Cong. (May 18, 2005); see also Ann Scott Tyson, *Panel Votes to Ban Women From Combat*, WASH. POST, May 12, 2005, at A8.

53. See Thom Shanker, *House Bill Would Preserve, and Limit, the Role of Women in Combat Zones*, N.Y. TIMES, May 20, 2005, at A20; Thom Shanker, *Military Bill Backtracks on Women*, N.Y. TIMES, May 26, 2005, at A24; Ann Scott Tyson, *Bid to Limit Women in Combat Withdrawn*, WASH. POST, May 26, 2005, at A1.

54. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 541, 119 Stat. 3136 (2006). Those with an appreciation for irony will note that Section 543 of the same Act increased the maximum military enlistment age to 42.

MILITARY VALUES IN LAW 991

imperative to amend the draft-registration law. The provision was more likely designed to make sure the military understood that the most important objective at hand was not the mission in Iraq, but was instead the continued vitality of *Rostker* and the illusion about women in military service that it preserves.

Classifications drawn on the basis of sex in a military context probably most often cause dignity harms, as in the case of the short-lived Close Combat Badge or in the military's once stubborn insistence that female military professionals wear a full-length gown—an *abaya*—and obsequiously defer to their male colleagues when traveling off-base in Saudi Arabia.⁵⁵ The consequences can also be more serious, as when women are denied the opportunity for valuable training offered to men performing the same duties—just because they are women.⁵⁶ Sometimes, however, military policy choices made for the purpose of preserving traditional roles can be recklessly lethal. On June 23, 2005, an attack on a convoy in Falluja, Iraq killed and injured more women than in any other single incident in the war. The women were forced to convoy long distances each day because, unlike men, they were not permitted to live near where they performed their duties of searching Iraqi women:

If anything, the women needed more protection because of their work in Falluja and the tension it was igniting, some marines said. They had been searching Iraqi women for weapons and other contraband and felt certain the task was infuriating insurgents. Even so, the military had the women follow a predictable

55. See Amended Complaint for Deprivation of Constitutional and Statutory Rights ¶¶ 13–20, *McSally v. Rumsfeld*, No. CV-02481 (D.D.C. May 3, 2002), available at <http://www.neubergerlaw.com/McSally%20Amended%20Complaint.PDF>, dismissed with prejudice per stipulation of the parties, No. CV-02481 (D.D.C. Apr. 24, 2004) (unpublished disposition), cited in Petition for Writ of Certiorari at 16, *McSally v. Rumsfeld*, No. 05-40 (U.S. July 1, 2005) (presenting the procedural question of an award of attorneys' fees; conceding that the underlying substantive question was mooted by the National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107–314, § 563, 116 Stat. 2458 (2002)), available at 2005 WL 1596607; see also Ann Gerhart, *The Air Force Flier in the Ointment: Martha McSally's Garb in Saudi Arabia Chafed, So She Pressed a Lawsuit*, WASH. POST, Jan. 7, 2002, at C1.

After challenging the policy from within the military for six years, McSally filed her original Complaint on December 3, 2001. See Petition for Writ of Certiorari, *McSally v. Rumsfeld*, *supra*, at 8–13. Less than a year later, Congress prohibited the military from requiring military women to wear *abayas*. See Pub. L. No. 107–314, § 563, quoted in Petition for Writ of Certiorari, *McSally v. Rumsfeld*, *supra*, at 2–3. Apparently, even for Congress (which has used and continues to use military policy to preserve traditional gender roles), requiring military women to wear *abayas* was a level of personal degradation that went too far.

56. In 2005, the Army opened Ranger training to men serving in non-combat roles, recognizing that the Iraq War had made formal distinctions between combat and non-combat arms less important:

The Global War on Terrorism (GWOT) created many new challenges for our Army. Traditional branch roles on the battlefield are no longer the norm for our forces and the threat facing us today requires that we ensure additional select leaders of CS [combat support] and CSS [combat service support] units receive the unique skills taught at Ranger School.

MILPER Message No. 05-067, Expansion of Ranger School Attendance to Combat Support (CS) and Combat Service Support (CSS) Branches (Mar. 9, 2005) (alterations added), available at http://www.military.com/MilitaryCareers/Content/0,14556,MPDC_CareerNews_Army_Enlisted_030905,00.htm l. The mission-oriented sentiment applies unless, of course, they are women: "Attendance at Ranger school will remain limited to Soldiers for whom the combat exclusion policy does not apply." *Id.*

routine: traveling to and from their camp each day at roughly the same time and on the same route through the city.

Some marines questioned whether they should have been traveling at all. Male marines also worked at the checkpoints, but did not have to face the dangers of the daily commute. They slept at a Marine outpost in downtown Falluja, but Marine Corps rules barred the women from sharing that space with the men.⁵⁷

It seems incredible that we would impose risk of injury or death on military women to satisfy ourselves that we are preserving their proper role in society. Nevertheless, the attractiveness of *Rostker v. Goldberg* is undeniable. It allows Congress to restrictively meter the benefits of equal protection for women under circumstances in which the Constitution might otherwise prove inconvenient, and it preserves the military as an arena in which notions of traditional gender roles still carry constitutional weight. *Rostker* is clearly *not*, however, a decision that protects and affirms the value of military judgment and leadership. The decision actually removes military judgment and leadership from the constitutional equation, and the Court's deferential stance relieves Congress and the military of any constitutional obligation to apply the military's professional judgment and experience to a determination of how women could most productively be used in military service.

Almost thirty years ago, a pre-*Rostker* decision of the United States District Court for the District of Columbia demonstrated an intuitive understanding of how equal protection for military women would be analyzed in a constitutional scheme that actually recognized the importance of military values:

But a career in the Navy is not measured entirely in terms of the employment opportunities and veterans' privileges that accompany military service. There is in addition to the practical benefits that inure upon serving in the Navy a moral element that forms an integral part of the overall experience. This springs from the idea of individuals taking part in an essential national enterprise to the limits of their abilities. This aspect of a naval career is not something plainly reserved for one gender rather than the other. But because of section 6015 [barring women from service aboard ships], sex is required to take precedence over individual ability where the essential part of naval service is concerned.⁵⁸

The essential wrong of *Rostker* is in its disregard for the expertise, values, and ethics of the military as a profession. As women began to progress toward becoming a more integral part of "an essential national enterprise" early in the all-volunteer era, Congress acted to conserve traditional notions of women, national obligation, and military service by excluding women from registration for a military draft. When their exclusion was challenged as a violation of equal protection, the Court offered much more than temporary validation of congressional choice given the limited nature of women's military service at the

57. Michael Moss, *A Mission That Ended in Inferno for 3 Women*, N.Y. TIMES, Dec. 20, 2005, at A1.

58. *Owens v. Brown*, 455 F. Supp. 291, 295 (D.D.C. 1978) (granting class certification to all Navy women affected by the statutory bar on sea service for purposes of bringing equal protection challenge) (alteration added). Like in *Rostker*, the statutory limitation on women's sea service in *Owens* was added over the military's objection, and the provision's legislative history suggested "a statutory purpose more related to the traditional way of thinking about women than to the demands of military preparedness." *Owens*, 455 F. Supp. at 305-06.

time. The Court offered an indefinite immunity from the effect of changing factual circumstances and from the constitutional burden to explain and justify why it was important to shield women from the possibility of involuntary military service. Even as a mainstream role for women in military service and a fundamental change in the nature of modern warfare rendered traditional conceptions of combat service obsolete, Congress continued to insist upon the continuing vitality of *Rostker* despite its disconnect from professional military judgment.

Judicial deference in matters concerning the military has its basis in judicial respect for professional military judgment, whether exercised by the military itself or relied upon by Congress in governing and regulating the military. The doctrine should have no relevance whatsoever when legislation acts as a bar to the exercise of military judgment, as it does with respect to contemporary issues of women in combat service.⁵⁹ Applying standard constitutional scrutiny to sex-based classifications in a military context does not inappropriately involve courts in military judgment; on the contrary, it simply removes an overbroad and unconstitutional legal bar to the military's ability to make those professional judgments.

II. SEXUAL ASSAULT IN A MILITARY ENVIRONMENT

The desire of Congress to remove traditional military values and professional military judgment from equal protection controversies involving women has had a tremendously corrosive effect on the military as a whole and on military women in particular. With respect to efforts to control sexual assault within the military, critics of military policy have also been complicit in ensuring that military values and judgment are not a part of proposed solutions. There is a strange parallel between congressional efforts to limit the influence of military professionalism in matters of equal protection and the efforts of policy critics to limit the influence of military professionalism in matters of sexual misconduct. Both see an advantage in limiting the military's role in addressing the issue: in the case of Congress, because military professionalism would draw attention to mission requirements instead of the maintenance of traditional gender roles; in the case of critics of military policy, because they tend to view military professionalism as the root of the problem, not the solution to the problem. Both are wrong.

The single greatest impediment to solving issues of sexual misconduct within the military is the assumption that issues related to women in military service involve different principles of leadership and different means of managing good order and discipline than other issues that affect all members of the military. This is the lesson, unfortunately, that a generation of military leaders has been consistently taught. Since the infamous "Tailhook" scandal of 1991,⁶⁰ we have lived through an endless cycle of repeated studies of sexual assault committed by and against members of the military, yet we have failed to

59. See *Owens*, 455 F. Supp. at 309 (finding that Congress, in enacting a flat ban against women serving on ships, had acted arbitrarily "by foreclosing the Navy's discretion regarding women well beyond the legitimate demands of military preparedness and efficiency").

60. See generally JEAN ZIMMERMAN, *TAILSPIN: WOMEN AT WAR IN THE WAKE OF TAILHOOK* (1995).

understand that, at its core, the problem of sexual misconduct in the military arises from a failure of leadership as a professional military ethic.

A. The Professional Values of Military Judgment and Leadership

The Army's keystone Field Manual on leadership, *Army Leadership: Competent, Confident, and Agile*, describes the ideal Army leader as a person who has "strong intellect, physical presence, professional competence, high moral character, and serves as a role model."⁶¹ The Manual also emphasizes the seven "Army Values" all soldiers must develop:

Loyalty
Duty
Respect
Selfless Service
Honor
Integrity
Personal Courage⁶²

These basic values embody the "principles, standards, and qualities considered essential for successful Army leaders"⁶³ and, not coincidentally, the word "leadership" serves as an approximate acronym for the seven Army Values. The Field Manual's teaching on leadership applies to enlisted members and officers of all ranks, from the most junior to the most senior, in accordance with the expectation that all members of the military will exercise some degree of leadership function within their area of responsibility, whether limited or expansive.

The responsibility inherent in military command, however, involves a special form of leadership:

Command is the authority that a commander in the military service lawfully exercises over subordinates by virtue of rank or assignment. Command includes the leadership, authority, responsibility, and accountability for effectively using available resources and planning the employment of, organizing, directing, coordinating, and controlling military forces to accomplish assigned missions. It includes responsibility for unit readiness, health, welfare, morale, and discipline of assigned personnel.

Command is about sacred trust. Nowhere else do superiors have to answer for how their subordinates live and act beyond duty hours. Society and the Army look to commanders to ensure that Soldiers and Army civilians receive the proper training and care, uphold expected values, and accomplish assigned missions.

61. Headquarters, Dep't of the Army, Field Manual 6-22, *Army Leadership: Competent, Confident, and Agile*, at viii (Oct. 12, 2006), available at <http://www.fas.org/irp/doddir/army/fm6-22.pdf>.

62. *Id.* ¶ 4-7, at 4-2-4-3.

63. *Id.* ¶ 4-5, at 4-2.

MILITARY VALUES IN LAW 995

In Army organizations, commanders set the standards and policies for achieving and rewarding superior performance, as well as for punishing misconduct.⁶⁴

In short, “[c]ommand makes officers responsible and accountable for everything their command does or fails to do.”⁶⁵

The United States Supreme Court recognized the breadth of military command authority and responsibility in *Parker v. Levy*,⁶⁶ an appeal from an Army doctor’s court-martial conviction for violation of two very generally worded provisions of the Uniform Code of Military Justice (UCMJ).⁶⁷ One of those provisions is called “the General Article,” in recognition of the broad sweep of a statute prohibiting “all disorders and neglects to the prejudice of good order and discipline in the armed forces.”⁶⁸ The other Article is hardly more specific, prohibiting “conduct unbecoming an officer and a gentleman.”⁶⁹ In the face of a constitutional challenge based on vagueness, however, the Court pointed to the comprehensive authority of military command and the necessity that commanders be given sufficient discretion to identify and punish breaches of good order and discipline within their units. The Court noted “the different relationship of the Government to members of the military”: “It is not only that of lawgiver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one.”⁷⁰ This comprehensive authority requires a system of discipline—embodied in the Uniform Code of Military Justice—that targets a much greater range of misconduct than civilian criminal codes but is also more flexible in the means provided to maintain discipline and correct or punish misconduct.⁷¹

The military has no independent prosecutorial authority with a role parallel to that of a civilian criminal prosecutor. The military’s prosecutorial authority is vested solely in military commanders as a matter of good order and discipline and military readiness. The same individual who is responsible for the mission and the people assigned to perform the mission—a commander at

64. *Id.* ¶¶ 2-10-2-12, at 2-3.

65. *Id.* ¶ 3-8, at 3-2.

66. 417 U.S. 733 (1974).

67. 10 U.S.C. §§ 801-946 (2000) (codifying the Uniform Code of Military Justice); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, Arts. 77-134, ¶¶ 1-113 (2005) [hereinafter MCM] (providing commentary and implementation guidance for the punitive Articles of the Uniform Code of Military Justice), *available at* <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

68. 10 U.S.C. § 934 (2000) (codifying Uniform Code of Military Justice, Article 134); *see also* MCM, *supra* note 67, at pt. IV, Art. 134, ¶ 60.a.

69. 10 U.S.C. § 933 (2000) (codifying Uniform Code of Military Justice, Article 133); *see also* MCM, *supra* note 67, at pt. IV, Art. 133, ¶ 59.a.

70. *Parker*, 417 U.S. at 751.

71. *See id.* at 749-50 (explaining that the UCMJ “regulates aspects of the conduct of members of the military which in the civilian sphere are left unregulated” but balances that intrusiveness with flexible levels of correction or punishment “which are below the threshold of what would normally be considered a criminal sanction”).

the appropriate level of authority—will also decide the manner in which misconduct will be disciplined or punished:

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.⁷²

The commander's decision is intensely situation-specific and fact-bound, and it requires in large part the application of military judgment and professional military values, including "the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline."⁷³

Military leaders understand and expect that they will be held responsible for misconduct within their units that undermines good order and discipline, and they have been given a distinctive system of military justice specifically designed to foster a professional ethic of leadership.⁷⁴ Justice Blackmun added a concurrence in *Parker v. Levy* in order to emphasize that maintenance of good order and discipline within a military environment requires greater exercise of judgment and discretion, in a manner not always predictable in advance, in comparison to the control of criminal behavior in a civilian context:

The subtle airs that govern the command relationship are not always capable of specification. The general articles are essential not only to punish patently criminal conduct, but also to foster an orderly and dutiful fighting force. . . . Moreover the fearful specter of arbitrary enforcement of the articles . . . is disabled, in my view, by the elaborate system of military justice that Congress has provided to servicemen, and by the self-evident, and self-selective, factor that commanders who are arbitrary with their charges will not produce the efficient and effective military organization this country needs and demands for its defense.⁷⁵

72. R.C.M. 306(b) discussion, in MCM, *supra* note 67, at pt. II, R.C.M. 306(b) (discussing the policy underlying the allocation of this authority to the commanding officer). "The Discussion is intended by the drafters to serve as a treatise . . . and may be used as secondary authority." *Appendix 21: Analysis of Rules for Courts-Martial: Introduction* § b.(1), in MCM, *supra* note 67, at A21-3.

73. R.C.M. 306(b) discussion, in MCM, *supra* note 67, at pt. II, R.C.M. 306(b).

74. The Preamble to the Manual for Courts-Martial states:

Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

MCM, *supra* note 67, at pt. I, ¶ 3.

75. *Parker*, 417 U.S. at 763-64 (Blackmun, J., concurring).

MILITARY VALUES IN LAW 997

A system of military justice that is so fundamentally dependent on the exercise of discretion and professional judgment inevitably withers when military leaders conclude, or are told, that their discretion and judgment are no longer necessary in maintaining good order and discipline. This is what has happened to military leadership with respect to the control of sexual misconduct. Military leaders have come to believe that there are two very different kinds of discipline for which they are responsible. One is the traditional military discipline that underlies mission readiness and performance, and to which military leaders apply the ethics and skills of leadership they have learned as part of their professional development. The other is an artificial category of military discipline comprised solely of issues involving and affecting military women. In this latter category, the ethics and skills of military leadership are viewed as inapplicable or even counterproductive. Where women are concerned, the military is much less likely to exercise the discretion and professional judgment praised by Justice Blackmun. Instead, the military often substitutes blunt instruments for decision-making that actively avoid the exercise of discretion or the wisdom of military experience.

B. The Absence of Military Judgment and Leadership in Matters Affecting Women

Instead of applying discretion and professional judgment, the military tends to address issues of sexual misconduct through policies of *Rostker*-like oversimplification. *Rostker* allowed Congress to rely on maleness as a broad proxy for utility in a military draft instead of specific qualifications more narrowly targeted to a governmental purpose of military readiness. In crafting policies concerning sexual misconduct, the military has similarly relied on broad generalities about the presumed propensities of men or women instead of specific and professional military judgments about particular conduct and its effect on good order and discipline in a military context. As a matter of military judgment, sexual misconduct should be viewed as but one example of a larger category of misconduct in which a service member has abused, harmed, or taken advantage of a colleague, thereby breaching a military value of loyalty and undermining military discipline. Unlike other typically recurring failures of discipline in which unit members may abuse one another, however—and which the military disciplines in accordance with professional values of leadership—the military often attempts to control misconduct that is sexual in nature with exaggerated, overbroad remedies that fail to take into account military expertise or military necessity. The military is much more likely to institute reforms that erase judgment from the equation entirely than to engage in individualized judgment concerning whether particular conduct interferes with good order and discipline or whether particular means of controlling or preventing misconduct are the most effective.⁷⁶

76. Policies related to so-called “women’s” issues tend to fall back on judgment-free means of dealing with something that is inevitably more complex. For example, the Naval Academy realized in 2006 that it had a serious problem with alcohol abuse as a risk factor for both perpetrators and victims of sexual assault. Rather than characterizing responsible drinking as a matter of professional judgment and professional ethics for soon-to-be officers of the United States Navy, the Academy

One method of addressing sexual misconduct has been to impose ham-fisted, judgment-free restrictions on the manner in which men and women interact with one another, even when the restrictions interfere with the performance of military duty, undermine unit cohesion, or raise significant questions concerning qualification for military service. For example, following multiple instances nationwide of sexual misconduct by military recruiters involving prospective recruits, the Indiana National Guard recently instituted the “No One Alone Policy” prohibiting military recruiters from meeting alone with applicants of the opposite sex.⁷⁷ The non-commissioned officers who serve as recruiters are presumably the same non-commissioned officers we rely on to protect the lives of junior personnel in a combat environment, but nonetheless a conference committee of Congress believed it was a sensible policy and directed the Department of Defense to consider military-wide implementation.⁷⁸ This method of reducing the potential for sexual misconduct is not limited to young and impressionable recruits. In Iraq today, female helicopter pilots fly combat missions in support of ground troops, but they cannot socialize with male aviators when they are off duty if the meetings take place in quarters assigned to men. Escorts must also accompany women as they walk through the military bases in which they live and work:

While aimed at maintaining discipline, the segregation can be isolating, Strye [a female pilot] said. “If all the guys hang out and play poker in one of the guy’s rooms, and I’m not allowed in there, I’ll never be part of that group. I’ll always be on the outside,” which makes it harder to cope with the pressures of deployments, she said. Implicit in the separation, Strye said, is a mistrust that grates on her as a professional. “You trust me to make combat decisions to defeat the enemy,” she said, “but don’t trust what I do when I go into another person’s ‘CHU,’”—a containerized housing unit.⁷⁹

centered its effort around a judgment-free, comic-book-level rule to guide midshipmen in their use of alcohol. Midshipmen were given a “memory aid” of “0-0-1-3,” which was intended to remind them that underage midshipmen should have zero drinks; drivers should have zero drinks; and midshipmen of age could have one drink per hour and three drinks per occasion. See Raymond McCaffrey, *Alcohol Policy, Penalties Tightened*, WASH. POST, Sept. 15, 2006, at B10; Raymond McCaffrey, *Naval Academy’s Leader Outlines His ‘24/7 Concerns,’* WASH. POST, Sept. 28, 2006, at A3 (reporting the Superintendent’s “24/7 concerns” as sexual misconduct, drug and alcohol abuse, and honor violations); Ray Rivera, *Reining in Academy Drinking: Shore Patrol Tries to Curb Midshipmen’s Off-Campus Alcohol Excesses*, WASH. POST, Apr. 25, 2006, at B1 (reporting that alcohol was a factor in two-thirds of Naval Academy sexual assaults).

77. Martha Mendoza, Associated Press, *AP Probe Looks at Recruiters’ Misconduct*, WASH. POST (online ed.), Aug. 19, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/19/AR2006081900285.html>.

78. See H.R. REP. NO. 109-702, at 707 (2006) (“The conferees direct that the review [of recruiter misconduct] also include an assessment of the ‘No One Alone Policy’ established by the State of Indiana National Guard to limit unsupervised contact between recruiters and recruit candidates of the opposite gender to determine if the policy is suitable for Department-wide implementation.”).

79. Tyson, *Female Pilots*, *supra* note 42 (alteration added); see also Ann Scott Tyson, *Reported Cases of Sexual Assault in Military Increase*, WASH. POST, May 7, 2005, at A3. (“In many U.S. military camps in Iraq, for example, signs are posted in female showers and other locations requiring U.S. servicewomen to be in the company of a ‘battle buddy,’ especially at night, for their safety.”) [hereinafter Tyson, *Reported Cases*].

MILITARY VALUES IN LAW 999

It would not be surprising if the military takes its lead in part from Congress when it disregards its own professional judgment and expertise in matters related to women. It is tremendously ironic that *Rostker* purports to protect the exercise of military judgment in the same area in which the military is least likely to apply it—on issues relating to women in military service. However, the military also takes its lead in part from its critics. Advocates for military women consistently press for policies and procedures that would address sexual misconduct by means outside of the traditional responsibilities of military leadership and without regard to professional military values. This trend is most applicable today in efforts to preserve privacy and confidentiality for military victims of sexual assault. The issue was satirized in a two-day sequence of the *Doonesbury* comic strip, which should have been a subtle warning that those advocating for greater privacy and confidentiality were missing a very important component of the problem. The comic-strip conversation took place between a female high-school senior, Alex, and the local Army recruiter, Sergeant Truman:

Alex: Sergeant Truman?

Recruiter: Alex! Great to see you! Finally ready to sign?

Alex: Not yet. I want to talk about sexual assault first.

Recruiter: Sexual assault? No longer a problem! We got it covered! If you get hassled, you can report it without triggering an investigation. That way you can take a deep breath before destroying a fellow soldier's career!

Alex: *Excuse* me?

Recruiter: Um . . . hold it. There might be new wording on this . . .

In the next day's strip, their conversation continued:

Alex: So my stepmom says there were 1,700 assaults last year. And it's way underreported!

Recruiter: Yes, but we're addressing the problem . . .

Alex: Wait, why do you keep calling it a problem? Sexual assault is a crime!

Recruiter: Well, of course it is . . . but this year we put in place a new prevention and response policy. If something inappropriate happens to you, reporting it now is a snap!

Alex: Reporting rape is a "snap"?

Recruiter: One call and you're in business! God forbid, of course.⁸⁰

The escort policy is reminiscent of the Army's strained version of the "battle buddy" principle that was implemented following sexual assaults against military trainees at Aberdeen Proving Ground in 1996, which required women to travel in pairs as protective escorts for one another while carrying out their daily business among male colleagues. See Associated Press, *Rape Charges Prompt Army to Reinforce Buddy System*, N.Y. TIMES, Nov. 9, 1996, at A9; Peter T. Kilborn, *Sex Abuse Cases Sting Pentagon, But the Problem Has Deep Roots*, N.Y. TIMES, Feb. 10, 1997, at A1. It is inexplicable to me why, ten years later, there is no significant question raised by a policy that seems to suggest the military cannot or will not protect its people from abuse by fellow service members.

80. Gary B. Trudeau, *Doonesbury*, May 25–26, 2005; see also Tyson, *Reported Cases*, *supra* note 79 (noting number of reported sexual assaults in 2004).

C. Privacy, Confidentiality, and Military Values

At the time the *Doonesbury* comic-strip series appeared, sexual assault against military women had been a high-profile subject of discussion in the news and within the military for two years, beginning with exposure of an ongoing disciplinary disaster involving sexual misconduct at the United States Air Force Academy. The top four officers at the Academy were relieved of duty after reports surfaced that male cadets had assaulted dozens of their female classmates, yet the Academy had failed to investigate their complaints or punish the perpetrators.⁸¹ A panel appointed by the Secretary of Defense to review the allegations, chaired by former congresswoman Tillie Fowler, concluded that the Academy had disregarded repeated warnings of significant problems related to sexual misconduct and abuse of authority among cadets.⁸² Other reviews, investigations, and reports followed like dominoes, as the focus on sexual assault within the military expanded beyond the Air Force Academy to include the combat theater of Iraq⁸³ and the other federal service academies.⁸⁴ The problem, as it so often is where military women are concerned, was a failure of leadership:

Sadly, this Panel found a chasm in leadership during the most critical time in the Academy's history—a chasm which extended far beyond its campus in

81. See Diana Jean Schemo, *4 Top Officers at Air Force Academy Are Replaced in Wake of Rape Scandal*, N.Y. TIMES, Mar. 26, 2003, at A10.

82. See U.S. DEP'T OF DEFENSE, REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 1 (2003) [hereinafter FOWLER REPORT], available at <http://www.defenselink.mil/news/Sep2003/d20030922usafareport.pdf>. The panel was formed at the direction of Congress to "carry out a study of the policies, management and organizational practices, and cultural elements of the United States Air Force Academy that were conducive to allowing sexual misconduct (including sexual assaults and rape) at the United States Air Force Academy." Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, § 502, 117 Stat. 559, 609 (2003). The Inspector General of the Department of Defense also evaluated the Air Force's institutional response to reports of sexual assault at the Academy over the previous decade. See generally OFFICE OF THE INSPECTOR GEN. OF THE U.S. DEP'T OF DEFENSE, EVALUATION OF SEXUAL ASSAULT, REPRISAL, AND RELATED LEADERSHIP CHALLENGES AT THE UNITED STATES AIR FORCE ACADEMY (2004), available at <http://www.defenselink.mil/news/Dec2004/d20041207igsummary.pdf>.

83. See U.S. DEP'T OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT (2004) [hereinafter TASK FORCE REPORT], available at <http://www.defenselink.mil/News/May2004/d20040513SATFReport.pdf>. Secretary of Defense Donald Rumsfeld ordered the review following reports of sexual assaults on military women deployed to Iraq and Kuwait. See *id.* at v. Secretary Rumsfeld directed the task force to undertake "a 90-day review of all sexual assault policies and programs among the Services and DoD and recommend changes necessary to increase prevention, promote reporting of sexual assaults, enhance the quality and support provided to victims of sexual assault, especially within combat theaters, and improve accountability for offender actions." *Id.* at 1.

84. See U.S. DEP'T OF DEFENSE, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES (2005) [hereinafter SERVICE ACADEMY REPORT], available at http://www.dtic.mil/dtfs/doc_recd/High_GPO_RRC_tx.pdf. The task force was formed at the direction of Congress to "recommend[] ways by which the Department of Defense and the Department of the Army and the Department of the Navy may more effectively address matters relating to sexual harassment and violence," including measures to improve victim safety, offender accountability, prevention, collaboration and cooperation with other military and civilian agencies, data collection, training, and guidelines. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 526, 117 Stat. 1392, 1466 (2003) (alteration added).

MILITARY VALUES IN LAW 1001

Colorado Springs. It is the Panel's belief that this helped create an environment in which sexual assault became a part of life at the Academy.

The Air Force has known for many years that sexual assault was a serious problem at the Academy.⁸⁵

The 2005 *Report of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies* found the inevitable connection between sexual misconduct against military women and widespread ignorance about the central role they play in military operations. One needs to look no further than Congress to discover the source of misunderstanding. Although Congress has grudgingly tolerated the increasing integration of women into combat and combat-support duties—as a matter of military necessity, it had little choice—it has also obscured and discounted their contribution in order to maintain a facade that military service by women does not carry the same constitutional weight as military service by men. This public misrepresentation of military service by women, however, undermines the respect they receive and affects the conditions under which they serve:

The expansion of women's roles was a carefully crafted strategy based on operational requirements, not on equal opportunity or political correctness. Unfortunately, many cadets and midshipmen misunderstand this point. This lack of understanding can contribute to a culture that diminishes the regard given to women and leads to questioning their presence at the Academies.⁸⁶

It is difficult to understand how reasonably aware, newspaper-reading cadets or midshipmen could fail to comprehend the contemporary place of women in military service, particularly given their interest in military and national-security affairs. The effect of law on perception, however, is a powerful one. If law teaches that women do not serve in combat and have no obligation as citizens to defend the nation, then that is the lesson future military leaders will take away. When one of the first specific ideas floated by the Air Force Academy to address its catastrophic failure of professional military values and leadership was to segregate and isolate female cadets in dormitory living arrangements⁸⁷—so they would be better-positioned to deter their own assaults—future military leaders learned an equally catastrophic lesson that problems related to women in the military are not real military problems. They are not corrected in the same way other breaches of military discipline are corrected. Rather than applying principles of military leadership to discipline those who engage in misconduct or, if necessary, to distance them from the military enterprise, they learn to distance those affected by the misconduct from the military enterprise. United

85. FOWLER REPORT, *supra* note 82, at 1.

86. SERVICE ACADEMY REPORT, *supra* note 84, at 8.

87. U.S. AIR FORCE ACADEMY, AGENDA FOR CHANGE (2003), available at <http://www.usafa.af.mil/superintendent/pa/agenda.cfm>.

Within a squadron, rooms occupied by female cadets will be clustered in the same vicinity near the women's bathrooms. The intent is to preserve basic dignity, deter situations in which casual contact could lead to inappropriate fraternization or worse, and to aid mentoring of lower-degree female cadets by senior female cadets.

Id.

States Representative Heather Wilson (R-N.M.), the first (and still the only) female military veteran to serve in Congress, had it exactly right when she said: "This is not about segregating women from men. It's about segregating rapists from the academy."⁸⁸

The risk that policymakers take when they attempt to satisfy those who, understandably, want to make it easier for women to report sexual assault is that they may unintentionally disregard distinctions between civilian and military contexts. In crafting policies to support military women as victims of misconduct, it is essential that they not be undermined as military professionals. However, the centerpiece of the Department of Defense's response to the latest spasm of attention to sexual assault in the military is likely to have that effect. Its recent studies of sexual assault in the military have all focused on the low rates of reporting in sexual assault cases, and its principal suggestion for reform has been to give women an option for confidential reporting outside the military chain of command.⁸⁹ Doonesbury's comic-strip satire drew its laughs by mocking the military's new *Confidentiality Policy for Victims of Sexual Assault*, issued on March 16, 2005.⁹⁰ Under the new policy's option for a confidential, "restricted" form of reporting, victims could disclose assaults to specified individuals (a Sexual Assault Response Coordinator or a health-care provider) for the purpose of obtaining medical treatment and counseling, but the information would not be forwarded to military command authorities. Victims would be free to choose restricted reporting if they did not want a military commander or military law enforcement to investigate the assault:

This reporting option gives the member access to medical care, counseling and victim advocacy, without initiating the investigative process.

The DoD is committed to ensuring victims of sexual assaults are protected, treated with dignity and respect, and provided support, advocacy and care.

88. Diana Jean Schemo, *Air Force Secretary Says Academy's Leaders Could Be Punished in Rape Scandal*, N.Y. TIMES, Apr. 2, 2003, at A18.

89. See SERVICE ACADEMY REPORT, *supra* note 84, at 7 ("One essential action is granting the option of confidentiality so that victims may seek help immediately without fear that the entire experience will become a public matter over which they have no control."); FOWLER REPORT, *supra* note 82, at 76 (recognizing that confidential reporting "had the potential of preventing command and law enforcement authorities from learning of serious criminal misconduct," but nonetheless recommending an option for confidential reporting).

90. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretaries of the Military Departments et al., *Confidentiality Policy for Victims of Sexual Assault*, JTF-SAPR-009 (Mar. 16, 2005) [hereinafter *Confidentiality Policy*], available at <http://www.defenselink.mil/news/Mar2005/d20050318dsd.pdf>. In the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 577, 118 Stat. 1811, 1926 (2004), Congress directed the Department of Defense to develop "a comprehensive policy" on sexual assault, including procedures for the confidential reporting of incidents. The Sexual Assault Prevention and Response Office (SAPRO) is now "the single point of accountability for Department of Defense (DoD) sexual assault policy." SAPR Welcome Statement, <http://www.sapr.mil> (last visited Feb. 11, 2007). Its comprehensive policy is set out in Department of Defense Directive 6495.01, *Sexual Assault Prevention and Response (SAPR) Program* (Oct. 6, 2005), available at http://www.dtic.mil/whs/directives/corres/pdf/649501_100605/649501p.pdf, and Department of Defense Instruction 6495.02, *Sexual Assault Prevention and Response Program Procedures* (June 23, 2006), available at http://www.dtic.mil/whs/directives/corres/pdf/649502_062306/649502p.pdf.

MILITARY VALUES IN LAW 1003

DoD policy also strongly supports effective command awareness and prevention programs, and law enforcement and criminal justice activities that will maximize accountability and prosecution of sexual assault perpetrators. To achieve these dual objectives, DoD policy prefers complete reporting of sexual assaults to activate both victims' services and accountability actions. However, recognizing that a mandate of complete reporting may represent a barrier for victims to gain access to services when the victim desires no command or law enforcement involvement, there is a need to provide an option for confidential reporting.

... Commanders have a responsibility to ensure community safety and due process of law, but they must also recognize the importance of protecting the privacy of victims under their command.⁹¹

This new policy permitting—almost encouraging—confidential reporting of sexual assault, which bypasses involvement by military commanders, was a gift to those looking for an excuse not to exercise military leadership in addressing the problem of sexual assault. In no other circumstance would military policy grant discretion to an individual military member to decide, for the purpose of preserving his or her own privacy, whether a commander had a need to know of a disciplinary issue within the unit, one so severe that it constituted the commission of a serious crime. When sexual assault occurs within a military unit, the perpetrator poses a risk not only to colleagues but also to military readiness. It is incomprehensible that in any other circumstance the military would expressly offer service members a choice about whether to withhold information concerning risk to the unit's mission or to its members.

This is not to say disclosure is easy. There have been notable instances during the present war in Iraq in which service members disclosed criminal activity by their colleagues at great physical risk to themselves. The abuses at Abu Ghraib came to light because an Army Specialist, a fairly junior service member, reported the misconduct to military investigators. Still on duty as a military police officer in Iraq, he slept with a loaded pistol: "They'd be walking around with their weapons all day long, knowing somebody has turned them in and trying to find out who. That was one of the most nervous periods of my life."⁹² More recently, a Private First Class came forward to report his suspicions that other members of his platoon had raped a 14-year-old Iraqi girl and then killed her and her family. He said, "I feared for my safety. Everyone has a weapon and grenades." In testifying at a preliminary hearing before court-martial, however, he explained that he decided to report because "it had to be done."⁹³ The fact that these junior service members were commended so highly for coming forward (at least in some military quarters) suggests that the military understands the pressure brought to bear against disclosure, and it may also reveal the military's expectation that, in many instances, this pressure will be

91. *Confidentiality Policy*, *supra* note 90, at 1–2.

92. See Richard Pyle, Associated Press, *GI Who Exposed Abu Ghraib Feared Revenge*, S.F. CHRON. (online ed.), Aug. 10, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/08/10/national/a104347D91.DTL&hw=abu&sn=001&sc=1000>.

93. See Paul Von Zielbauer, *Soldier Who Testified on Killings Says He Feared for His Life*, N.Y. TIMES, Aug. 8, 2006, at A10.

effective in preventing disclosure. Nevertheless, the military would never consider issuing a policy expressly inviting a service member to withhold information about criminal activity within the unit at the service member's individual discretion.

It makes a very specific statement about the status of women in military service when they are granted an exemption from the professional expectation that members of the military may need to risk their personal safety, not to mention their personal sense of discomfort or invasion of privacy, to protect other service members or ensure mission readiness. This expectation of disclosure can undoubtedly impose great hardship on those who serve in the military. It illustrates, however, how the different values and obligations operating in a military environment can and should affect policy choices in matter of sexual assault. A civilian victim is under no obligation to take action for the benefit of anyone other than herself or himself. A military victim, in contrast, will often have a professional responsibility to take action in service of a larger purpose. The new restricted-reporting policy, however, makes absolutely no reference to the effect that a victim's decision not to report an incident will have on military readiness or on the safety and well-being of other members of a military unit.

Recognition of the professional values and obligations of military victims of sexual assault does not diminish in any way, of course, the far greater responsibilities of military leadership. The only productive means of addressing the issue of sexual misconduct in the military is to hold military commanders responsible for their failures of leadership. A policy that permits restricted reporting outside military channels directly undermines this principle. Restricted reporting excuses failures of military leadership by simply excising military leadership from the solution, imposing a trifecta of harms on the military and on military women: (1) in the short term, it denies military commanders the information necessary to punish and prevent sexual assault; (2) in the long term, it teaches military leaders that sexual assault is a problem unrelated to traditional military discipline; and (3) it diminishes and disrespects military women by assuming that women are less able or less willing than men to report misconduct that sabotages military readiness. If Congress, the military, or critics of military policy are dissatisfied with the performance of military leaders in punishing and preventing sexual assault, they need to hold them accountable for failures of leadership in the same manner in which they would hold them accountable in situations not involving violence against women. The answer is not to drive the responsibility underground and relieve military commanders of the obligation to protect the people they lead.

Similar concerns arise with respect to evidentiary privileges when applied in prosecutions of sexual assault. Military Rule of Evidence 513 grants "a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."⁹⁴ The patient is the

94. MIL. R. EVID. 513(a), *in* MCM, *supra* note 67, at pt. III, M.R.E. 513(a); see generally Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a*

MILITARY VALUES IN LAW 1005

holder of the privilege, but the psychotherapist may also claim the privilege on the patient's behalf.⁹⁵ If the production of confidential psychotherapist-patient communications is a matter in dispute, the rule also provides for a hearing on the motion (which may be closed upon good cause shown) and, if necessary to rule on the motion, *in camera* review of the records or communications by the military judge.⁹⁶

The reach of the military's psychotherapist-patient privilege was bitterly contested in one of the cases arising out of the Air Force Academy's sexual assault scandal—in fact, the only case to proceed to court-martial. Joseph Harding, by then a graduate of the Academy and serving as an Air Force officer, was charged with the rape of Jessica Brakey when both were cadets.⁹⁷ The defendant sought production of counseling records presumably containing communications between Brakey and a civilian sexual-assault counselor, and Brakey resisted production of the records for years throughout a heated and convoluted litigation history that saw her counselor threatened with arrest.⁹⁸ Ultimately, the military judge dismissed the charges against Harding because the counselor, acting on Brakey's desire to preserve the privilege, refused to turn over the counseling records.⁹⁹

Critics of the military's record of addressing allegations of sexual assault uniformly pointed to the military justice system as the source of the problem.¹⁰⁰ Their perception was that the military's psychotherapist-patient privilege failed to protect the victim's privacy and undermined efforts of military women to obtain counseling on a confidential basis, and they believed the weakness of the privilege was tied to the military's hostility to allegations of sexual assault. Evidentiary privileges in courts-martial, however, like military rules of evidence

Victim and Victim-Advocate in the Military, 185 MIL. L. REV. 149, 170–74 (2005) (discussing the psychotherapist-patient privilege in courts-martial). The military's psychotherapist-patient privilege was enacted in 1999 following *Jaffee v. Redmond*, 518 U.S. 1 (1996), which recognized a psychotherapist-patient privilege as a matter of federal common law. See *Appendix 22: Analysis of the Military Rules of Evidence: Section V—Privileges, Rule 513*, in MCM, *supra* note 67, at A22-44. "The Analysis sets forth the nonbinding views of the drafters as to the basis for each rule or paragraph, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law. The Analysis is intended to be a guide in interpretation." *Appendix 21: Analysis of Rules for Courts-Martial: Introduction § b.(2)*, in MCM, *supra* note 67, at A21-3. Military rules of evidence also include a rape shield rule that bars evidence of a victim's prior sexual behavior or sexual predisposition on the same basis as Federal Rule of Evidence 412. See MIL. R. EVID. 412.

95. MIL. R. EVID. 513(c), in MCM, *supra* note 67, at pt. III, M.R.E. 513(c).

96. MIL. R. EVID. 513(e), in MCM, *supra* note 67, at pt. III, M.R.E. 513(e).

97. See Michael Janofsky & Diana Jean Schemo, *Women Recount Life as Cadets: Forced Sex, Fear and Silent Rage*, N.Y. TIMES, Mar. 16, 2003, § 1, at 1 (reporting Brakey's allegations and her subsequent dismissal from the Academy).

98. See *United States v. Harding*, 63 M.J. 65 (2006); *United States v. Harding*, No. 05-5003 (Dep't of the Air Force, USAF Trial Judiciary July 14, 2006) (unpublished Memorandum and Ruling on Motion to Dismiss) (on file with author) [hereinafter *Harding Ruling*].

99. See Erin Emery, *AFA Rape Charge Dismissed; Therapist Kept Records Private; The Accuser's Attorney Says the Military's Decision Will Allow the Springs DA to Look Into the Case*, DENVER POST, Oct. 1, 2006, at C1.

100. See, e.g., Diane Carman, *Be Glad the Air Force Doesn't Fly Like It Prosecutes*, DENVER POST, June 23, 2005, at B5.

more generally, are based on the rules that apply in federal civilian courts.¹⁰¹ In *United States v. Harding*, the military judge ordered *in camera* review of counseling records in response to the defendant's motion under the Confrontation Clause of the Sixth Amendment. Whether or not one would agree with the military judge's decision that Harding had made a sufficient showing to warrant production of the records, the request for production was based on the constitutional right to confront witnesses through cross-examination¹⁰² and not on any unique exception applicable only to courts-martial. The same motion could and would have been made in a civilian federal court. Similarly, the military judge's authority to subpoena the records or issue a warrant for the arrest of the civilian sexual-assault counselor was no greater than the authority that could have been exercised by a civilian federal judge.¹⁰³

Although the issues that received the greatest attention in news reports were the military judge's order to produce confidential counseling records, the counselor's refusal to comply with the order under an assertion of privilege, and the subsequent dismissal of the criminal charges when the records were not produced, there was absolutely no discussion of whether the victim's assertion of privilege should have been permitted to control the prosecution of a rape charge in the military justice system. There are two ways to view the outcome of the prosecution in *United States v. Harding*: either (1) the victim was put to an unfair choice between waiving a privilege accorded to confidential psychotherapist-patient communications or seeing the charges against the defendant dismissed; or (2) the victim was given the sole discretion to choose whether a breach of discipline—a crime—within a military unit would be punished, when in any other circumstance a military commander would have made the decision whether a prosecution should go forward. In the case of Joseph Harding, a commander made the decision to prosecute a member of the military for the rape of a colleague, but an evidentiary privilege gave the colleague the authority to overrule the commander.

The military's psychotherapist-patient privilege, interestingly, does contain an exception that is peculiarly military and would be unavailable in a civilian context. Under Military Rule of Evidence 513, there is no privilege "when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of

101. See MIL. R. EVID. 101(b), *in MCM*, *supra* note 67, at pt. III, M.R.E. 101(b):

If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply:

(1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and

(2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

102. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974) (holding that the defendant's right to cross-examine a witness prevailed over confidentiality of juvenile proceedings). *But see* *Newton v. Kemna*, 354 F.3d 776 (8th Cir. 2004) (denying discovery of privileged mental health records for the purpose of cross-examination under the Confrontation Clause).

103. See R.C.M. 703(e)(2), *in MCM*, *supra* note 67, at pt. II, R.C.M. 703(e)(2) (governing the subpoena of civilian witnesses).

MILITARY VALUES IN LAW 1007

a military mission.”¹⁰⁴ This exception recognizes that the military justice system serves broader goals than simply punishing a specific offender. Military commanders are responsible for the safety of an entire community in a way that civilian prosecutors are not, and military commanders are responsible for the accomplishment of an assigned mission in a way that has no counterpart whatsoever in the civilian world.

In a court-martial involving a military defendant and a *civilian* victim of sexual assault, application of the psychotherapist-patient privilege raises no difficult issues related to professional military values. Based on the defendant's evidentiary showing, the Constitution either will or will not require production of counseling records to enable the defendant to adequately confront the testimony of the victim, and that decision will be a matter of constitutional law, not military necessity. When both the victim and the defendant are members of the military, however, the victim's assertion of privilege is at least potentially inconsistent with the victim's professional obligation to place the military's institutional need to discipline misconduct undermining military readiness above an individual desire not to reveal communications concerning the criminal act. This is not an easy problem to resolve. If the result is to deny military women a privilege that protects confidential counseling and facilitates treatment following sexual assault, it seems unduly harsh. If the result is to take the judgment and authority to discipline sexual offenders away from military commanders and transfer that professional discretion to military victims who would prefer privacy to prosecution, however, it seems unduly counterproductive to the professional status of military women and to the cause of preventing and disciplining sexual assault. This is a much greater risk both to women and to military readiness.

CONCLUSION

When all sides of the debate tend to minimize the importance of military judgment, expertise, and values in crafting laws and policies that affect women serving in the military, military women are consistently disadvantaged. Greater reliance on military values may offer the one neutral principle that could, perhaps unexpectedly, accord military women the constitutional and professional standing necessary to ensure that respect for women in military service matches the responsibility that women have for military service. It is undoubtedly ironic that almost no one sees an advantage in crediting principles of military professionalism and the contributions of military expertise and judgment as appropriately important factors in constitutional analysis or in legislative or policy decisions regarding the military. Congress works to obscure military expertise so that it will not disrupt the traditional sense of comfort we find in the belief that military service by women is not as important to national security as it actually is. Critics of Congress work to obscure military expertise and also to relieve military women from their professional values and obligations, based on their assumption that military values are inherently inconsistent with military service by women. The military remains caught in the

104. MIL. R. EVID. 513(d)(6), *in* MCM, *supra* note 67, at pt. III, M.R.E. 513(d)(6).

middle, responsible for accomplishing its mission but also tempted by undue constitutional exemption and pressured by public criticism. Often the easiest solution is the one that involves the least professional military judgment. The most productive solution, however, may be the one that involves the most.